In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 913

EARL MISSLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial in the United States District Court for the District of Maryland, petitioner was convicted of violating 18 U.S.C. 1503, the federal obstruction of justice statute, by hiring and paying money to one Vincent Ferrara to bring about the murder of Richard O'Keefe, a prospective government witness at petitioner's then pending trial on charges of hijacking from an interstate shipment. The court of appeals affirmed (414 F. 2d 1293; Pet. App. 1a–14a).

The pertinent facts are not in dispute, and are set forth in detail in the opinion below (Pet. App. 3a–4a). On December 27, 1967, while on bond following his indictment in the hijacking case, petitioner met

with Ferrara for the purpose of discussing the elimination of O'Keefe, a prospective witness at the hijacking trial. Petitioner agreed to pay Ferrara $4,000 to have O'Keefe killed. During the first week of January 1968, he paid Ferrara $1,500. On January 9, 1968, Ferrara telephoned the FBI and informed them about the O'Keefe "contract." He also told agents Faulkner and Cobb that he expected petitioner to visit him that morning for the purpose of making an additional payment, and he invited them to come to his home. The agents reported the call to the United States Attorney, asking for instructions and stating that the meeting was expected to take place within fifteen or twenty minutes. The United States Attorney advised them to accept Ferrara's invitation. Accordingly, the agents went to Ferrara's home and secreted themselves at the head of the stairs leading to the second floor, where they heard petitioner make incriminating statements about the agreement to have O'Keefe murdered. The agents—as well as Ferrara—testified to this conversation at trial.

1. Petitioner, apparently rejecting any distinction between overhearing of a conversation by the naked ear and the use of government-furnished electronic equipment to transmit or record it, contends that the present case is controlled by the outcome of *United States* v. *White*, No. 46, this Term, certiorari granted, 394 U.S. 957. The court below correctly concluded, however (Pet. App. 9a–10a & n. 6), that this case is distinguishable from *White*, since the only conversation which the government overheard took place in the home

of the informant. See *Lewis* v. *United States*, 385 U.S. 206. The court of appeals—without deciding the question presented in *White*, whether the warrant requirement of *Katz* v. *United States*, 389 U.S. 347, is applicable to consensual eavesdropping by electronic instrument (*i.e.*, whether *Katz* effectively overruled *Lopez* v. *United States*, 373 U.S. 427, and *On Lee* v. *United States*, 343 U.S. 747)—held that *Katz* at the least would not protect a person who entered the *home of another* to transact illegal business from having his conversation overheard by government agents present with the consent of the owner of the premises. This ruling was correct. See *Alderman* v. *United States*, 394 U.S. 165, 179 n. 11.[1]

2. Petitioner cites *Massiah* v. *United States*, 377 U.S. 201, and *Beatty* v. *United States*, 389 U.S. 45, in support of his claim that his Sixth Amendment right to counsel was infringed by the government's overhearing of his conversation since it took place following his indictment in the hijacking case. As the court below held, however (Pet. App. 10a–11a), *Massiah* and *Beatty* were distinguishable because the investigation in each of those cases was designed to acquire further evidence of the crime with which the defendant was already charged, and the defendant's statements were introduced at his trial on that charge. Here, on the other hand, the United States Attorney

[1] On the facts of this case, moreover, where the agents learned of the informer's impending meeting with petitioner only minutes before the time when it was to occur, there was no effective opportunity to secure a prior judicial approval to listen in on the conversation. See *Warden* v. *Hayden*, 387 U.S. 294.

authorized the overhearing solely to corroborate an allegation of petitioner's involvement in a different federal crime—obstruction of justice through the elimination of a prospective government witness—and the issue is the admissibility of evidence of the overheard conversation in the obstruction trial. It was entirely proper for the agents to accept Ferrara's invitation to discover whether his allegation of the planned murder was accurate. A defendant's indictment on one charge cannot have the effect asserted by petitioner of insulating him from the use, at a trial on another charge, of information obtained by subsequent investigation of his complicity in that separate offense. See *Hoffa* v. *United States,* 385 U.S. 293, 304–310. To be sure, the crimes here (as in *Hoffa*) were related, in that proof of petitioner's scheme to murder O'Keefe would normally be admissible at his trial on the hijacking charge to show guilt. But, whatever the applicability of *Massiah* to the hijacking case,[2] it did not forbid introduction of the agents' testimony in the trial on the present offense, in respect of which the overhearing was prior to the indictment or any "critical stage".

3. Petitioner also asserts alleged violations of the Jencks Act (18 U.S.C. 3500) by the government at trial. These contentions are answered in the opinion of the court below, on which we rely (See Pet. App. 11a–13a). Even if the "notes" of agents Faulkner and Cobb may fairly be attributable to the agents and not

[2] This appears to be a moot question, since petitioner states that he was acquitted of the hijacking offense (Pet. 12).

to Ferrara and petitioner, the destruction of the notes did not require a new trial. These were sketchy notes which, in accord with customary FBI practice, were destroyed after the agents had prepared a formal report of the conversation and after the agents had satisfied themselves that this "report was a full and accurate statement of the days events * * *" (Pet. App. 12a). The report was turned over to defense counsel at trial. This Court has consistently denied certiorari in such circumstances. See, *e.g., United States* v. *Comulada,* 340 F. 2d 449, 451 (C.A. 2), certiorari denied, 380 U.S. 978. There is no reason for a different result here.

It is therefore respectfully submitted that the petition for a writ of ceritorari should be denied.

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